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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

RANDALL ALAN CARDER,

Defendant and Appellant.

F074045

(Super. Ct. No. VCF291712)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Kathryn T. Montejano, Judge.

Kendall Dawson Wasley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez, Stephen G. Herndon, Louis M. Vasquez, Julie A. Hokans and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Franson, Acting P.J., Peña, J. and Smith, J.

INTRODUCTION

Appellant Randall Alan Carder stands convicted of assault with a deadly weapon, a violation of Penal Code¹ section 245, subdivision (a)(1). It also was found true that Carder inflicted great bodily injury in violation of section 12022.7, subdivision (a); personally used a deadly or dangerous weapon in violation of section 12022, subdivision (b)(1); had a prior strike conviction; a prior serious felony conviction pursuant to section 667, subdivision (a)(1); and had served a prior prison term. Carder contended the trial court erred prejudicially when it failed to instruct sua sponte on the affirmative defense of self-defense. He also asserted defense counsel rendered ineffective assistance by failing to request the self-defense instruction. In our unpublished opinion filed July 5, 2018, we affirmed the judgment.

By order filed March 25, 2019, we granted Carder's motion to recall the remittitur, vacate the July 5, 2018 opinion, and permitted supplemental briefing on the application of Senate Bill No. 1393, which granted trial courts discretion to strike serious felony enhancements, to Carder's sentence. We will remand for resentencing to permit the trial court an opportunity to exercise its discretion with respect to the section 667, subdivision (a)(1) enhancement and in all other respects, affirm.

FACTUAL AND PROCEDURAL SUMMARY

An information filed February 24, 2014, charged Carder with assault with a deadly weapon, a violation of section 245, subdivision (a)(1), and that he inflicted great bodily injury within the meaning of section 12022.7, subdivision (a) and personally used a deadly weapon within the meaning of section 12022, subdivision (b)(1). The information also charged Carder with assault with the intent to commit a specific sex crime during a burglary, in violation of section 220, subdivision (b); forcible acts of sexual penetration, a violation of section 289, subdivision (a)(1)(A); sexual battery, a violation of section

¹ References to code sections are to the Penal Code unless otherwise specified.

243.4, subdivision (a); and first degree burglary, a violation of section 459. In addition, multiple enhancements or special allegations were alleged, including that Carder had suffered a prior strike conviction; had a prior serious felony conviction; and had served a prior prison term.

Testimony at trial from the victim, Brenda J., was that during the early morning hours of October 3, 2012, she was asleep in her apartment. A loud noise woke her up and she saw a man in black standing over her. The man had a knife in his hand and was trying to choke her. Brenda was trying to fight “him off” as the man was “puncturing, like poking it [the knife] to my skin.”

Brenda recently had surgery and “only had one breast at this time.” She was fighting so the knife “wouldn’t go in this area.” She was trying to kick the wall to alert a neighbor. The man got Brenda “off the bed by [her] throat.” Brenda managed to “get the knife away from him and threw it to [the] closet door.”

Brenda told the man she needed to get up off the floor. He lifted her up and guided her to the bed. The man told her “to be quiet and to shake my head yes to everything he says.” The man talked about “doing something in the past” to a “relative of his, to another girl.” As the man removed her pajamas, he was threatening her and her “family if they came through the door.”

Brenda testified the man subjected her to various acts of unwanted sexual contact. She was bleeding from the puncture wounds inflicted by the knife. Brenda felt she was “fighting for my life here.”

Her friend, Andrew, then came to the door and the man told Andrew to leave saying, “Brenda has company.” Brenda told the man, “if you’re going to kill me, just go ahead and kill me.” She jumped off her bed and ran toward the front door. The man ran out the back of the apartment.

Andrew testified he went to the apartment to check on Brenda and bring her some food because she was “sick with cancer.” He heard noises in the apartment and went to

his truck to get a hammer. He returned and heard Brenda “crying in the bedroom.” She was “all bloody and stuff.” Andrew noticed “two or three cuts or stabs on her.” He called 911.

Brenda was transported to the hospital, where she received treatment for one of the knife wounds she sustained in the attack that punctured a lung. She was in the hospital four to five days. She had difficulty breathing because of the puncture to her lung. While in the hospital, she also received several stitches in five or six areas of the arm and chest for the other knife wounds.

Visalia Police Officer Detective Scott Nelson was dispatched to Brenda’s apartment. He arrived after Brenda was transported to the hospital. Nelson contacted Brenda at the hospital; she was “frantic and hurting.” When Nelson went to speak with her the next day, she was “still ... panicked” and “medicated.” When Nelson showed Brenda a photo lineup on October 5, 2012, she did not pick anybody from the lineup as her attacker.

Two of Brenda’s neighbors saw a man climbing over the fence behind Brenda’s apartment the morning Brenda was attacked. One neighbor, Susan, described the man as “pretty disheveled” and having his shoes off; he threw the shoes over the fence. The man was hanging on to his pants as he attempted to climb over the fence. The other neighbor, Mary, remembered the man was wearing all black. He was not bleeding or cut anywhere that she could see.

When Brenda returned to her apartment, she found a pair of boxer shorts and black socks that had been left behind by her attacker. Those items were given to Nelson. The boxer shorts had blood stains on them. Both the boxer shorts and socks were tested for DNA. The DNA results returned a male profile that was entered into a databank.

About a year after the incident, Susan was contacted to possibly identify the man. Both Susan and Mary identified Carder at trial as the man climbing over the fence that day.

After Carder was identified as a suspect, a “known reference sample” of DNA from Carder was tested against the DNA results from the boxer shorts and socks. In comparing the “major contributor” from the swab taken from the inside of the boxer shorts to Carder’s DNA sample, Carder could not be eliminated as a contributor to the sample from the boxer shorts. The male DNA profile from the boxer shorts would be expected to occur in “one in 15 sextillion African-Americans, one in 2.9 quintillion Caucasians and one in 1.9 sextillion Hispanics.” Carder also could not be eliminated as a contributor to the DNA obtained from the socks.

Carder testified at trial that he had an arrangement with Brenda for her to perform oral sex in exchange for \$30. Carder claimed that on October 3, 2012, he went to Brenda’s and she let him into the apartment. Part way through the oral sex act, Brenda asked for her payment. Carder did not have all the money and Brenda became “really irate fast.” He claimed Brenda went to the kitchen and returned with a knife, then attacked him with the knife.

Carder said he “counterattacked” and “struck [Brenda] hard with [my] right hand a couple times.” He “grabbed her wrist” and “pulled the knife out of her hand.” Carder stated he was “blocking her strikes,” she was “striking with a closed fist.” Carder decided to “apply a little pressure with the knife” and he struck Brenda “mildly once with the knife in the chest area.” That did not stop Brenda and “[s]he was getting hurt with the knife.”

Brenda’s “chest was bubbling and bleeding.” Carder testified he knew he “was in trouble” and “was panicked.” At that point, someone began “banging on the door very aggressively.” Carder grabbed his pants and shoes, “bolted out the back door,” climbed over the fence, and “ran.” He acknowledged he had “a rough time getting over the fence” and ran past “two ladies” as he fled.

The parties discussed jury instructions on March 29, 2016, which is before Carder testified in his own defense. After Carder testified on March 30, 2016, the jury

instructions were finalized. Defense counsel did not request the jury be instructed with CALCRIM No. 3470 and the trial court did not issue the instruction sua sponte.

The jury found Carder guilty of assault with a deadly weapon in violation of section 245, subdivision (a)(1) and found the great bodily injury and personal use of a deadly weapon enhancements true. The jury found Carder not guilty of all other charges. In a bifurcated trial, the trial court found the section 667.5, subdivision (b), section 667, subdivision (a)(1), and section 1170.12, subdivisions (a) through (d), special allegations to be true.

At the May 25, 2016 sentencing hearing, the trial court imposed a total term of 15 years, including five years for the section 667, subdivision (a)(1) enhancement. Carder filed a timely notice of appeal on June 23, 2016. In our unpublished opinion filed July 5, 2018, we affirmed the judgment.

Carder filed a petition for review with the California Supreme Court, which was denied on September 19, 2018. Remittitur issued September 20, 2018. A petition for writ of certiorari was filed in the United States Supreme Court on December 12, 2018.²

On December 18, 2018, Carder filed with this court a motion to recall the remittitur, reinstate the appeal, and permit supplemental briefing on the application of Senate Bill No. 1393 to this case. By order filed March 25, 2019, this court recalled the remittitur, reinstated the appeal, and directed supplemental briefing on the Senate Bill No. 1393 issue.

DISCUSSION

Carder contends the trial court erred because it did not instruct the jury sua sponte with CALCRIM No. 3470. He also contends defense counsel was ineffective for failing to request the self-defense instruction. In supplemental briefing, Carder contends his case must be remanded for resentencing in light of Senate Bill No. 1393 to allow the trial

² The petition ultimately was denied on May 20, 2019.

court an opportunity to exercise its discretion with respect to the section 667, subdivision (a)(1) enhancement.

Self Defense Instruction

Carder maintains that this was a “classic case of ‘he said, she said’” and the jury believed him and acquitted him of all the sex offenses. He apparently contends that had the jury been instructed on the defense of self-defense, he would have been found not guilty of that charge and failure to so instruct is therefore prejudicial error. Carder maintains the evidence supported a self-defense instruction.

““It is settled that in criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence” and “necessary for the jury’s understanding of the case.” [Citations.] It is also well settled that this duty to instruct extends to defenses ‘if it appears ... the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant’s theory of the case.’ [Citations.]” (*People v. Brooks* (2017) 3 Cal.5th 1, 73.)

“A trial court is required to instruct sua sponte on any defense, including self-defense, only when there is substantial evidence supporting the defense, and the defendant is either relying on the defense or the defense is not inconsistent with the defendant’s theory of the case. [Citation.]” (*People v. Villanueva* (2008) 169 Cal.App.4th 41, 49.) Substantial evidence is “evidence which is reasonable, credible, and of solid value” (*People v. Shelmire* (2005) 130 Cal.App.4th 1044, 1055, quoting *People v. Johnson* (1980) 26 Cal.3d 557, 578) and is “sufficient for a reasonable jury to find in favor of the defendant.” (*People v. Salas* (2006) 37 Cal.4th 967, 982, citing *Mathews v. United States* (1988) 485 U.S. 58, 63.) In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether “there was evidence which, if believed by the

jury, was sufficient to raise a reasonable doubt.” (*Salas, supra*, at p. 982, quoting *People v. Jones* (2003) 112 Cal.App.4th 341, 351.)

On review, we independently determine whether substantial evidence existed to support the defense. (*People v. Shelmire, supra*, 130 Cal.App.4th at p. 1055; *People v. Sisuphan* (2010) 181 Cal.App.4th 800, 806.) “[T]he circumstances must be sufficient to excite the fears of a reasonable person’ [Citations.] Moreover, ... the fear must be of imminent harm. ‘Fear of future harm—no matter how great the fear and no matter how great the likelihood of the harm—will not suffice.’” (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082.) “[A]ny right of self-defense is limited to the use of such force as is reasonable under the circumstances. [Citation.]” (*People v. Minifie* (1996) 13 Cal.4th 1055, 1065.)

The elements of self-defense are: (1) the defendant reasonably believed he was in imminent danger of suffering bodily injury or being touched unlawfully; (2) the defendant reasonably believed the immediate use of force was necessary to defend against that danger; and (3) the defendant used no more force than was reasonably necessary. (CALCRIM No. 3470; *People v. Clark* (2011) 201 Cal.App.4th 235, 250.) The right to self-defense includes the right to use reasonable force to resist any harmful or offensive touching. (*People v. Myers* (1998) 61 Cal.App.4th 328, 335 [“[A]n offensive touching, although it inflicts no bodily harm, may nonetheless constitute a battery, which the victim is privileged to resist with such force as is reasonable under the circumstances.”]; *People v. Martinez* (1970) 3 Cal.App.3d 886, 889 [“Any harmful or offensive touching constitutes an unlawful use of force or violence.”].)

For purposes of this argument, we assume Carder testified truthfully regarding the attack and credit his testimony. Nevertheless, his own testimony does not support a self-defense instruction. Carder testified that Brenda attacked him with a knife and he “counterattacked” and “struck [Brenda] hard with [my] right hand a couple times.” Carder then admitted he “grabbed her wrist” and “pulled the knife out of her hand.” At

this point, Carder could have exited the apartment and avoided all further confrontation. There was no need to defend himself further and attack Brenda with a knife.

Instead of exiting the apartment after he disarmed Brenda, Carder remained in place and stated Brenda was “striking with a closed fist.” Carder’s response was to “apply a little pressure with the knife” and he struck Brenda “mildly once with the knife in the chest area.” Carder claimed the wound to her chest did not stop Brenda and “she was getting hurt with the knife.” Thus, his testimony is that he continued to strike or puncture Brenda with the knife, more than once.

Carder is six feet, two inches tall and weighs 260 pounds. Brenda was suffering from cancer and recuperating from surgery at the time of the attack. By his own testimony, Carder was able to easily disarm Brenda. After Brenda was disarmed, Carder used the knife to attack Brenda. While Carder minimizes the attack, by claiming he applied a “little pressure” and struck her once “mildly” with the knife in her chest area, the evidence discloses otherwise.

Carder had no wounds from the attack he claimed Brenda perpetrated against him. After taking the knife from Brenda, Carder inflicted multiple knife wounds to Brenda; one of those wounds, which punctured a lung, was potentially life-threatening. Brenda had a puncture wound to her upper left chest, a second puncture wound mid-sternum, and multiple puncture wounds and abrasions to her arms. For the defense of self-defense to apply, “the defendant must *actually and reasonably* believe in the need to defend.” (*People v. Humphrey, supra*, 13 Cal.4th at p. 1082, italics added; accord, *People v. Lee* (2005) 131 Cal.App.4th 1413, 1427.) At the point Carder attacked Brenda with the knife, there was no actual or reasonable need to remain in the apartment and defend himself.

Moreover, any right of self-defense is limited to the use of such force as is reasonable under the circumstances. (*People v. Minifie, supra*, 13 Cal.4th at p. 1065.) For a man of Carder’s height and weight to use a knife to defend from ineffectual blows from a woman recuperating from cancer surgery is not a reasonable use of force. Carder

was able to disarm Brenda, by his own testimony, by striking her hard with his right hand “a couple times” and then grabbing her wrist. He had no need to defend himself by using a deadly weapon and use of a deadly weapon was unreasonable under the circumstances.

Assuming, arguendo, the trial court’s decision not to instruct the jury on self-defense violated defendant’s constitutional rights, such an error was harmless under either *People v. Watson* (1956) 46 Cal.2d 818 or *Chapman v. California* (1967) 386 U.S. 18 because any evidence supporting self-defense “was, at best, extremely weak.” (*People v. Sakarias* (2000) 22 Cal.4th 596, 621; accord, *People v. Manriquez* (2005) 37 Cal.4th 547, 582-583.) The neighbor, Mary, saw no wounds or blood on Carder as he fled the scene. Furthermore, Carder’s own testimony established that he had easily disarmed Brenda, and then proceeded to strike Brenda with a deadly weapon, the knife, when Brenda was not armed with any weapon. Carder deliberately inflicted multiple wounds on Brenda with a knife, including one potentially life-threatening wound when he punctured her lung. In other words, there was little direct or circumstantial proof that Carder was using only such force as was reasonable under the circumstances (*People v. Minifie, supra*, 13 Cal.4th at p. 1065) or that he reasonably believed he needed to defend himself by remaining in the apartment after disarming Brenda (*People v. Humphrey, supra*, 13 Cal.4th at p. 1082).

No Ineffective Assistance of Counsel

The standard of review when questioning whether a defendant received effective representation is well established. “In order to establish a claim for ineffective assistance of counsel, a defendant must show that his or her counsel’s performance was deficient and that the defendant suffered prejudice as a result of such deficient performance. [Citation.] To demonstrate deficient performance, defendant bears the burden of showing that counsel’s performance “““fell below an objective standard of reasonableness ... under prevailing professional norms.””” [Citation.] To demonstrate prejudice, defendant bears the burden of showing a reasonable probability that, but for counsel’s

deficient performance, the outcome of the proceeding would have been different.”
(*People v. Mickel* (2016) 2 Cal.5th 181, 198.)

As we have concluded the trial court had no sua sponte duty to instruct the jury with CALCRIM No. 3470 because the evidence does not support a self-defense instruction, Carder has failed to demonstrate that defense counsel’s failure to request the instruction was either deficient performance or prejudicial.

Senate Bill No.1393

Senate Bill No. 1393 (2017-2018 Reg. Sess.), signed into law on September 30, 2018, and effective on January 1, 2019, amended sections 667 and 1385 to give trial courts discretion to strike serious felony enhancements. (Stats. 2018, ch. 1013, §§ 1, 2.) Senate Bill No. 1393 applies retroactively to cases not yet final on appeal because it lessens potential punishment for certain offenses within the meaning of *In re Estrada* (1965) 63 Cal.2d 740, 745.

The parties agree that Senate Bill No. 1393 applies retroactively to defendants whose judgments are not yet final on the statute’s operative date. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) The parties also agree the matter should be remanded for an exercise of discretion by the trial court. Consistent with the case law on this issue, we accept the parties’ position.

DISPOSITION

The matter is remanded with directions that the trial court exercise its discretion to impose or strike the five-year prior serious felony enhancement imposed pursuant to section 667, subdivision (a)(1). In all other respects, the judgment is affirmed.